IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

Case No. 80-662

ROBERT C. SULLIVAN,
Agent for Pipe Fitters Claimants,
Petitioners,

v.

ALBERT G. GILES,
Administrator, Ohio Bureau of Employment Services, et al.,
Respondents.

ON APPEAL FROM
THE SUPREME COURT OF OHIO

MOTION TO DISMISS OR AFFIRM AND BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

On November 5, 1976, Robert C. Sullivan, Appellant herein, filed a "Notice of Appeal" to the Common Pleas Court of Hamilton County, Ohio from a decision of the Unemployment Compensation Board of Review of the State of Ohio. At the time of the filing of this appeal the Appellant failed to name Albert G. Giles, Administrator of the Ohio Bureau of Employment Services as a party-appellee and similarly failed to serve said Notice upon him as required by Section 4141.28 (O), Ohio Revised Code. Thereafter, on February 22, 1977, after finding out about the appeal through informal means, Mr. Giles petitioned the court to be made a party. The appeal progressed through the State Court system of Ohio and was ultimately lodged in the Ohio Supreme Court. While pending consideration before that Court, the failure to name and serve Administrator Giles at the outset was discovered and a motion to dismiss was filed and granted by the Court based solely on state law.

THIS COURT LACKS JURISDICTION TO REVIEW STATE COURT DECISIONS RESTING ON ADEQUATE STATE GROUNDS.

In the case of *Herb v. Pitcairn,* 324 U.S. 117 (1954) Justice Jackson, speaking for the Court stated that this Court has, from the time of its foundation adhered to the principal that it will not review judgments arising out of the state courts which rest on adequate and independent state grounds. In more recent years, this Court has held that no review will lie where a party has merely failed to abide by a state procedural requirement because such matters are adequate state grounds. [See *Michigan v. Tyler,* 436 U.S. 499 (1978); *Parker v. North Carolina,* 397 U.S. 790 (1970].

In the instant case the Appellant's case was dismissed because of his failure to follow the simply procedural requirements of Section 4141.28 (O), Ohio Revised Code.

The jurisdiction of all Ohio Courts is necessarily derived from the Constitution of Ohio.

Article IV, Section 4 (B) of the Constitution provides:

> The courts of common pleas and divisions thereof shall have such original jurisdiction over all justicable matters and such powers of review of proceedings of administrative officers and agencies *as may be provided by law.* (Emphasis added)

The emphasized clause has been interpreted to mean that only the General Assembly may grant common pleas courts the jurisdictior to hear administrative appeals. In *Shady Acres Nursing Home, Inc. v. Board of Building Appeals,* 50 Ohio App. 2d 391 (Lake Cty., 1976), *Motion to Certify overruled,* 12-31-76, it was held that a new trial was not available upon judicial review of an administrative agency determination because a new trial had not been specifically provided by the General Assembly. The Court noted that by virtue of Article IV, Section 4 (B), courts of common pleas are courts of *limited* jurisdiction with regard to administrative appeals, and exercise jurisdiction in such cases only pursuant to specific statutory grants of jurisdiction.

The Ohio Supreme Court has also recognized that only the General Assembly may grant jurisdiction to courts to hear special statutory proceedings. In *Malloy v. City of Westlake,* 52 Ohio St. 2d 103 (1977) it was held:

> The law is clear in Ohio that special statutoy provisions, if jurisdictional, are substantive laws of the state anc cannot be abridged, enlarged, or modified by the Ohio Rules of Cviil Procedure. (52 Ohio St. 2d 103, 104-105)

See also *Akron v. Gay,* 47 Ohio St. 2d 164 (1976). While both of these cases are rooted in Article 4, Section 5 (B), they make it plain that the jurisdictional requirements of special statutory proceedings are derived solely from the Revised Code.

Thus, Section 4141.28 (O), Revised Code, defines the limit of the subjct matter jurisdiction of the Common Pleas Court in this matter.

In granting ourts of Common Pleas the jurisdiction to hear unemployment compensation appeals, the General Assembly set forth several jurisdictional prerequisites. In pertinent part Section 4141.28 (O) provides:

> An interested party may, within thirty days after notice of the decision of the board was mailed to the last known post office address of all interested parties, appeal from the decision of the board to the court of common pleas of the county wherein the appellant, if an employee, is resident or was last employed or of the county wherein the appellant, if an employer, is resident or has his principal place of business in this state. Such appeal *shall* be taken within such thirty days *by the appellant by filing a notice of appeal* with the clerk of the court of common pleas, with the board, and *upon all appellees,* by certified mail to their last known post office address.
>
> * * *

> *All other interested parties before the board or the referee shall be made appellees.* (Emphasis added)

"Interested party" is a term defined by the Ohio Revised Code. Section 4141.01 (I) provides:

> " *'Interested party' means the administrator* and any party to whom notice of a determination of an application for benefit rights or a claim for benefits is required to be given under Section 4141.28 of the Revised Code." (Emphasis added)

Section 4141.28 (O) is quite clear in stating that a copy of the Notice of Appeal *must* be filed with the Administrator within thirty (30) days of the mailing of the Board's decision. In the instant case the decision of the Board of Review was mailed on October 15, 1976; but the Appellant's Notice of Appeal was never filed with the Administrator.

The Ohio Supreme Court has held that a timely filing of the Notice of Appeal with all "interested parties" is a condition precedent to subject matter jurisdiction (See *Todd v. Garnes,* (1975) 44 Ohio St. 2d 56; *In re Claim of King,* (1980) 62 Ohio St. 2d 87; *Sullivan v. Kaiser Eng.* (1980) 62 Ohio St. 2d 304.

This interpretation of 4141.28 (O), Ohio Revised Code, has been universally followed in Ohio in the following cases, which are cited not as authority, but to show their number: *U.S. Steel v. Board of Review,* Lorain No. 2967 (9th Dist. Ct. App., May 14, 1980); *Joseph Bagdonas v. Board of Review,* Summit Cty. 9648 (9th Dist. Ct. App., May 28, 1980); *William J. Leitold v. Board of Review,* Cuyahoga Cty. No. 41852 (8th Dist. Ct. App., June 19, 1980); *Maria F. Montoya v. Stokely Van Camp,* Lucas Cty. No. L-79-354 (6th Dist. Ct. App. June 13, 1980), and *In re Calim of Lowell S. Chapman,* Columbiana Cty. No. 79-C-35 (7th Dist. Ct. App., June 27, 1980); *David Å. Romstadt v. Little Sisters of the Poor,* No. 80-437 (Ohio Supreme Ct., unreported, (1980)); and *In re claim of Vanessa T. Woolfork,* No. 2996 (9th Dist. Ct. App., September, 1980).

THE APPELLANT HAS FAILED TO FRAME A CONSTITUTIONAL ISSUE.

The Appellant herein has failed to come forward with any coherent constitutional theory and has, similarly, failed to enunciate which of numerous tests he would wish to see this Court apply. It has long since been established that to establish a constitutional challenge, a party must do more than merely mumble the mystic incantation of "due process"; he must clearly establish the elements of his theory (See *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61).

To the extent that the Appellant has raised an issue concerning notice to the Administrator, he has failed to address the fact that Section 4141.28 (O), Ohio Revised Code, requires that the Administrator, as trustee of the unemployment trust fund, must be *named* as a party since a judgment is not enforceable against a non-party. (See *Hansberry v. Lee,* 311 U.S. 22).

CONCLUSION

It is respectfully submitted that the decision of the Ohio Supreme Court was correct and should be affirmed or, in the alternative, that the Appellant's appeal should be dismissed because of a lack of a substantial federal question.

Respectfully submitted,

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APPENDIX A

Section 4141.28 (I), Ohio Revised Code

(I) "Interested party" means the administrator and any party to whom notice of a determination of an application for benefit rights or a claim for benefits is required to be given under section 4141.28 of the Revised Code.

APPENDIX B

Section 4141.28 (O), Ohio Revised Code

(O) Any interested party may, within thirty days after notice of the decision of the board was mailed to the last known post office address of all interested parties, appeal from the decision of the baord to the court of common pleas of the county wherein the appellant, if an employee, is resident or was last employed or of the county wherein the appellant, if an employer, is resident or has his principal place of business in this state. Such appeal shall be taken within such thirty days by the appellant by filing a notice of appeal with the clerk of the court of common pleas, with the board, and upon all appellees by registered mail to their last known post office address. Such notice of appeal shall set forth the decision appealed from and the errors therein complained of. Proof of the filing of such notice with theboard shall be filed with the clerk. All other interested parties before the board or the referee shall be made appellees. The board upon written demand filed by an appellant shall within thirty days after the filing of such demand file with the clerk a certified transcript of the record of the proceedings before the board pertaining to the decision complained of, and the appeal shall be heard upon such record certified by the board. A bill of exceptions shall not be required. After an appeal has been filed in the court, the board may, by petition, be made a party to such appeal. If the court finds that the decision was unlawful, unreasonable, or against the manifest weight of the evidence, it shall reverse and vacate such decision or it may modify such decision and enter final judgment in ar ordance with such modification; otherwise such court shall affirm such decision. Any interested party shall have the right to appeal from the decision of the court as in civil cases, provided a bill of exceptions shall not be required at any level of appeal.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Opposition to Petition for Certiorari to the Supreme Court was sent this _____ day of _____ 1980 to Harold G. Korbee, Counsel for Appellant, 817 Fourth and Race Tower, 105 West Fourth Street, Cincinnati, Ohio 45202 and to J. Mack Swigert 600 Dixie Terminal Building, Cincinnati, Ohio 45202 Counsel for Employer Appellees.

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